Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAY 30 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

NYNEX REPLY COMMENTS

NYNEX Telephone Companies

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Dated: May 30, 1996

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SUMMARY

The Comments filed in this proceeding contain sharply contrasting positions. For example, the incumbent LECs' competitors propose interpretations of the Act that would result in the break up of the LECs' network into piece parts that are sold at lowest possible price, if not given away for free. This will undermine Congress' goal of ensuring a competitive local exchange telecommunications market through facilities-based competition.

The development of facilities-based competition will also be deterred if the incumbent LECs are required to provide interconnection facilities and network elements based on TSLRIC. If the Commission adopts pricing guidelines that ignore actual imbedded investment as well as joint and common costs, it would cause such a sharp drop in LEC revenues as to threaten their ability to continue to provide quality local exchange service. The Commission should therefore allow LECs to charge for interconnection and network elements based on accounting costs, including a reasonable amount of joint and common costs associated with all facilities provided to interconnectors which, for the most part, will be facilities that are already in-place.

NYNEX recommends that the Commission adopt the "two tiered rules" approach espoused by several State commissions in their comments. Under this approach, the Commission would adopt "first tier" rules that include minimum standards (such as baseline unbundling requirements) that satisfy the Act's checklist requirements while still providing carriers with room to negotiate and States with the ability to meet their own goals for local competition. The "second tier" rules would be more detailed and serve as an optional model for States that desire federal assistance.

Finally, access and universal service reform must be accomplished explicitly and correctly, not as a side effect of interconnection rules. The Commission must therefore not allow its rules in this proceeding to serve as a vehicle for interexchange carriers to avoid access charges either directly or through the use of a "shell" affiliate. This will only impede the development of real facilities-based local exchange competition and have a major adverse impact on universal service.

The framework proposed by NYNEX in its initial Comments and these Reply Comments will allow competition in the local exchange and exchange access market to develop without burdening incumbent LECs with unnecessary regulation and without diminishing the role reserved to the States by the Act. If the Commission adopts this framework, it will achieve Congress' goal of promoting facilities-based competition; it will enable incumbent LECs to recover their costs of providing interconnection, network elements and resale services; and it will preserve and advance universal service.

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NYNEX REPLY COMMENTS

The NYNEX Telephone Companies ("NYNEX")[1] hereby submit these Reply Comments in the above-captioned matter.

I. INTRODUCTION

In its Comments, NYNEX proposed a framework that the Commission should utilize to promote competition for local exchange and exchange access service. Specifically, NYNEX showed that the Act's interconnection requirements (Section 251(c)(2)) allow a facilities-based competitive local exchange carrier (CLEC) to interconnect its network with the incumbent LEC's network so that the CLEC may provide local exchange and exchange access to its customers. The Act's unbundling requirements (Section 251(c)(3)) allow a CLEC to fill out its network by combining its own facilities with facilities provided by an incumbent LEC. The Act's resale requirements allow a competitor to provide local exchange service, without having to build its own facilities, through resale of LEC retail services.

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1 The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

The comments filed in this proceeding contain sharply contrasting positions. For example, the incumbent LECs' competitors are looking to break up the LECs' network into pieceparts that are sold at the lowest possible price, if not given away for free.

More importantly, the interpretations of the Act proposed by several parties to this proceeding will undermine the development of facilities-based local exchange competition. For example, several parties argue that competitors are entitled to use the unbundling provisions of the Act to purchase the entire LEC network, piece by piece, at cost-based rates. Such a result would deter the construction of local exchange facilities by competitors, thereby frustrating Congress' goal of ensuring a competitive local exchange telecommunications market through facilities-based competition.

Thus, the Commission should not allow a competitor to obtain, at cost-based prices, all of the network elements that comprise a LEC service and then combine these network elements (or require the incumbent LEC to do so) to form the service offered by the LEC. As MFS notes,[2] this would create "artificial or inefficient incentives for resale in lieu of the construction of competitive facilities." Thus, incumbent LECs should only be required to provide unbundled network elements to competitors that have their own network facilities and need to combine those facilities with the incumbent LEC's facilities to provide local exchange and exchange access service.

The development of facilities-based competition will also be deterred if the incumbent LECs are required to provide interconnection facilities and network elements based on "total service long run incremental costs" (TSLRIC) as defined by the interexchange carriers (ICs), which represent the lowest possible costs for the requested facility based on the hypothetical

[2] MFS, pp. 4, 40.

costs that a LEC would incur if it built entirely new plant to provide service. If the Commission adopted pricing guidelines for network elements that ignored actual embedded investment as well as joint and common costs, it would prevent incumbent LECs from recovering their costs and it would discourage facilities-based competition in the local exchange market because it would be very difficult for a new entrant to meet the prices of the incumbent LECs. It would also cause such a sharp drop in LEC revenues as to threaten their ability to continue to provide quality local exchange services. In order to prevent this from happening, the Commission should allow LECs to charge for interconnection and network elements based on "accounting costs" contained in the Part 32 USOA system of accounts, prior to the Part 36 separations process. These costs should include a reasonable amount of joint and common costs associated with the facilities provided to interconnectors which, for the most part, will be facilities that are already in-place.

There is also a sharp division between State commissions regarding the proposals in the NPRM. Some State commissions believe that the Commission is attempting to go far beyond its approval role under the Act,[3] while others welcome detailed rules.[4]

As NYNEX noted in its comments, the Commission must guard against creating a morass of rules and regulations that will hamper the development of competition in all telecommunications markets.[5] Congress clearly intended that interconnection should be achieved

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3 See NYDPS, p.5 (the proposed rules would "transform states from independent sovereigns...to little more than unfunded federal agents").

4 See North Dakota PSC, p.1 ("the limited staff and the demand of other responsibilities will impair North Dakota's efforts to do a thorough and timely job of resolving the numerous interconnection issues without some specific standards from the FCC").

5 The proposed interconnection rules, for example, will not only impact competition in the local exchange market, they will also play a central role in evaluating BOC compliance with the checklist requirements of Section 271 for entry into in-region long-distance service.

through carrier negotiations with review by State commissions. Nevertheless, NYNEX recognizes that there are States that have yet to adopt rules that permit competition in local telecommunications markets. In order to give States the flexibility to enact or retain local competition rules that reflect each State's own individual characteristics, while at the same time ensuring that competition is permitted to flourish in all States, NYNEX recommends that the Commission adopt the "two-tiered rules" approach espoused by several State commissions in their comments.[6]

Under this approach, the Commission would adopt "first tier" rules that include minimum standards (such as baseline unbundling requirements) that satisfy the Act's requirements while providing carriers with room to negotiate and States with the ability to meet their own goals for local competition. The Commission should specify that compliance with these "first tier" rules will satisfy the checklist requirements of Section 271. Once the BOCs are able to enter the long-distance business, they will have an opportunity to increase their revenues to offset the additional risks and costs that they will incur in complying with additional unbundling and interconnection requirements that might be imposed by State Commissions. The "second tier" rules would be more detailed in their requirements, serving as an optional model for States that desire assistance in developing rules (including pricing) for local exchange competition. These "second tier" rules would also be used by the Commission to carry out its duties where preemption of State law or arbitration of interconnection agreements is necessary. Such an approach would perhaps enable the Commission to avoid court challenges by the most pro-competitive States which view aggressive federal rulemaking as unwarranted and overbearing.

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6 See, e.g., Connecticut DPUC, p.3; Oregon PUC, p.19; Florida PSC, p. 2.

Finally, everyone agrees that access reform and reduction of access charges is necessary. NYNEX desires this as much as anyone else. However, access and universal service reform must be accomplished explicitly and correctly, not as a side effect of interconnection rules. For example, where NYNEX and a CLEC jointly provide either terminating or originating access to an IC, there should be a "sharing" of access charges. The CLEC should not be able to obtain cost-based service under Section 251 for this type of joint arrangement. On the other hand, if the CLEC does not use any part of the incumbent LEC's network, there would be no splitting of access charges. The Commission therefore must not allow its rules in this proceeding to serve as a vehicle for ICs to avoid access charges either directly or through the use of a "shell" affiliate. This will only impede the development of real facilities-based local exchange competition and have a major adverse impact on universal service.

The framework proposed by NYNEX in its initial Comments and in these Reply Comments will allow competition in the local exchange and exchange access market to develop without burdening incumbent LECs with unnecessary regulation and without diminishing the role reserved to the States by the Act. If the Commission adopts this framework, it will achieve Congress' goal of promoting facilities-based competition; it will enable incumbent LECs to recover their costs of providing interconnection, network elements and resale services; and it will preserve and advance universal service.

II. SECTION 251(c)(2) ONLY APPLIES TO INTERCONNECTION BETWEEN TWO FACILITIES-BASED COMPETITORS FOR THE PURPOSE OF PROVIDING LOCAL EXCHANGE AND EXCHANGE ACCESS SERVICE. IT DOES NOT APPLY TO EXCHANGE ACCESS SERVICES PROVIDED BY INCUMBENT LECs TO INTEREXCHANGE CARRIERS

As NYNEX showed in its initial comments, it is clear that the Act was not intended to have any effect on existing carrier access rates. In particular, Section 251(c)(2) relates solely to the physical interconnection of an incumbent LEC's network with the network of a facilities-based competitor so that the competitor may provide local exchange and exchange access service. The section does not apply to an incumbent LEC's interconnection with an IC to enable the IC to transmit and route interexchange traffic. This is clear from the language of § 251(c)(2), from its legislative history, and from the statutory structure and purpose.

A number of parties raise in their comments a variety of policy arguments that purportedly mandate access charge reform. Thus, at the outset, it is important to emphasize that nothing in NYNEX's proposed interpretation of Section 251 prevents the Commission from reviewing the policy, economic, and other arguments that other parties have made concerning access charges in the proper context of an access charge reform proceeding. In such a proceeding, however, the Commission should not consider itself bound by a supposed legal requirement that access be priced pursuant to the "cost plus" standard of Section 252(d)(1). Rather, in considering access charge reform the Commission is free to make the policy judgments it deems appropriate, guided by the structure and purpose of the Communications Act as a whole. The only issue *now* before the Commission is whether Section 251 mandates any particular changes in access rates. The answer is clearly no.

Commenting parties also offer a number of strained interpretations of the language of Sections 251(c)(2), 251(g), and 251(i) in an attempt to argue that the language of those sections permits and indeed requires changes in access rates. These arguments are baseless.

Some parties focus on the fact that Section 251(c)(2) requires incumbent LECs to provide interconnection "for the facilities and equipment of *any* requesting telecommunications carrier" (emphasis supplied).[7] However, the issue is not what type of carrier is making the request but rather the purpose for which interconnection is being sought. As explained in our initial Comments, the obligation to provide interconnection is limited to cases where the requesting carrier is using interconnection to provide exchange and exchange access services. Section 251(c)(2)(A) is explicit in this respect.

Other commenting parties argue that the language of Section 251(c)(2)(A), which limits the incumbent LEC's obligation to the provision of interconnection "for the transmission and routing of telephone exchange service and exchange access," does not refer to the services that the requesting carrier seeks to provide to its customers, but rather the services that the incumbent LEC would be providing to the requesting carrier.[8] That interpretation is, however, contrary to the most natural reading of the language of Section 251(c)(2)(A) and inconsistent with its legislative history which makes it clear that the section was intended to apply to interconnection between competing local exchange carriers. It is also contrary to Section 251(i) which makes it clear that the Act was not intended to affect the Commission's authority under Section 201. That

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7 See, e.g., CompTel, pp. 50-51 ("If Congress intended to require the requesting carrier to offer exchange access service, it would not have written the provision broadly to apply to 'any requesting telecommunications carrier.' Rather, Congress would have used the narrower term 'local exchange carrier'").

8 See, e.g., American Petroleum Institute, p. 5; Cable & Wireless, p. 28; CompTel, pp. 49-50; MCI, p. 78.

section is the principal authority for Commission establishment of interstate access charges. Finally, it simply does not make sense. Given the statutory definition of exchange service, for example, it is hard to see how it could be argued that a LEC is making that service available to an interconnected IC or CLEC.

CompTel and MCI argue that an IC meets the Section 251(c)(2)(A) test even if that section is interpreted to require that the requesting carrier provide exchange access to its customers.[9] In the view of those parties, an IC purchasing exchange access and using it to provision an interexchange toll service is in effect "offering" (albeit indirectly) exchange access service to its customers. That argument, however, would blur the distinction between exchange access service and telephone toll service, as those terms are used in the Act, and in doing so would make those terms virtually meaningless.[10]

Another tack taken by some commenters is to argue that the word "and," as used in Section 251(c)(2)(A), doesn't really mean what it says, and that it should be interpreted to mean "or." Thus, it would be sufficient for a requesting carrier to offer either exchange access *or* exchange service to its customers.[11] That interpretation could permit an IC or an affiliate to interconnect with an incumbent LEC for the purpose of providing exchange access to the IC itself. Aside from the fact that interpreting the word "and" to mean "or" would violate the plain meaning rule, such an interpretation would permit ICs to evade the clear intent of Sections 251(c)(2), 251(i), and 251(g).

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9 CompTel, p. 51; MCI, p. 79.

10 In any event, a carrier that uses exchange access to provision a toll service cannot claim to be "reselling" exchange access to its customers.

11 See, e.g., Telecomm. Resellers Ass'n, pp. 48-49.

LDDS argues that nothing should hinge on whether a requesting carrier seeks to provide exchange service, exchange access, or some other service altogether, since such distinctions between services are becoming meaningless in the brave new world created by the Act.[12] That argument ignores, however, the fact that the terms "exchange access" and "exchange service" are both defined and used in the Act. Any interpretation that ignores the distinction between the two is simply not grounded in the Act itself, and indeed would directly contravene it. It is Congress, not LDDS, that must decide whether the distinctions between these services are viable or meaningless.

As noted in NYNEX's initial comments, both Section 251(i) (preserving the Commission's authority under Section 201) and Section 251(g) (preserving Commission's exchange access regulations) reinforce the proper interpretation of Section 251(c)(2). Here also, various commenting parties seek to deny the force of these sections by proposing strained interpretations that are inconsistent with the sections' plain meaning.

One approach taken by some parties is to argue that the application of Section 251(c)(2) to LEC/IC interconnection would not violate Section 251(i) since the Part 69 regime could coexist with an interconnection-based pricing regime with ICs picking and choosing whichever alternative best suits their own particular needs.[13] This approach is somewhat disingenuous since it would preserve the formal existence of the Commission's Part 69 regulations while rendering them, for all practical purposes, totally meaningless. It therefore could not be what Congress had in mind in enacting Section 251(i). Other commenters argue that their proposed interpretation of Section 251(c)(2) doesn't violate Section 251(i) since it would leave the

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[12] LDDS, pp. 70-72.

[13] <u>See</u>, <u>e.g.</u>, CompTel, pp. 56-60.

Commission with *some* powers under Section 201, such as the power to promulgate rules related to physical connection or to adjudicate complaints.[14] Those parties ignore the fact that their interpretation would cut the heart out of Section 201 by effectively denying the Commission power over interstate access *charges*.

Two other arguments raised by some commenters also need to be addressed here. First, CompTel and others argue that Section 252(i), which requires that Section 252 interconnection agreements be made available to any other requesting telecommunications carrier "under the same terms and conditions as those provided in the agreement," means that any form of interconnection that is provided to a CLEC must also be provided to an IC.[15] However, the "terms and conditions" of an interconnection agreement with a CLEC would include the explicit requirement that the interconnection be used for the requesting carrier's provision of exchange service and exchange access to its customers. That term or condition would also bind any IC who sought to invoke Section 252(i).

Second, a number of parties argue that NYNEX's interpretation of Section 251(c)(2)(A) is in effect unenforceable since an IC could evade it simply by forming an affiliated entity that would interconnect with the incumbent LEC and use the interconnection to provide exchange access to the IC. There are two objections to that analysis. First, as discussed above and in NYNEX's initial comments, the requesting carrier must provide both exchange access *and* exchange service. Second, Section 251(c)(2) does not permit a telecommunications carrier to purchase either exchange or exchange access services. Instead, it provides for the purchase of interconnection facilities. If a carrier wishes to purchase facilities to provide exchange or

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[14] Cable & Wireless, p. 31; MCI, pp. 81-83.

[15] CompTel, p. 66.

exchange access services, it can do so under Section 251(c)(3). Alternatively, a non-facilities-based carrier may use the resale provisions of Section 251(c)(4). Moreover, as Pacific Telesis correctly observed in its initial comments: "[A]n IC or other carrier who interconnected with us for the sole purpose of offering competing access services would do nothing to stimulate local exchange competition, but would merely undermine the Commission's access charges and policies."[16]

III. SECTION 251(c)(2) APPLIES TO COMPETING CMRS PROVIDERS, BUT NOT TO NON-COMPETING NEIGHBORING LECS

NYNEX showed in its Comments that interconnection requests by CMRS providers "for the transmission and routing of telephone exchange service and exchange access" within the incumbent LECs' service area were governed by Section 251(c)(2), while the requests of non-competing, neighboring LECs are not (NYNEX, pp. 22-28).

A. Section 251(c)(2) Requires LECs To Interconnect With Two-Way CMRS Providers

Wireless service commenters offer various arguments to support their view that Section 251(c)(2) does not apply, or apply fully, to LEC interconnection with CMRS providers. None of these nullify the application of the statute to these LEC interconnections.[17]

PCIA among others argues that Sections 251-252 provide guidance to the Commission in establishing the obligations of LECs to provide interconnection, but do not apply to CMRS providers (PCIA, p. 10). However, each part of the legislative history PCIA refers to addresses competition with the LEC within the local exchange and none distinguish wireline and wireless

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[16] Pacific Telesis, p. 78.

[17] They also request the establishment of "Bill-and-Keep" arrangements (Section IX, infra).

competitors.[18] Accordingly, PCIA falls back on the unsupported notion that wireless carrier services are not "traditionally" associated with "telephone exchange service" and "exchange access." In fact, the Commission has always considered wireless service to be primarily, if not exclusively, local in nature.[19] Further, the Commission looks to PCS carriers as potential local exchange competitors.[20] Finally, the statutory definitions of "telephone exchange service" and "exchange access" fit the LEC-CMRS service (Section 3 (16) and (47)).[21] There can be no question that LECs have interconnection obligations toward CMRS providers, although the record clearly establishes that CMRS providers are not themselves obligated to provide interconnection under Sections 251(b) or (c).

Commenters also argue that the application of Section 251(c)(2) to LEC-CMRS interconnection requires the "repeal by implication" of Section 332(c) because it returns to the

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[18] See, e.g., PCIA, p. 11 ("the Joint Explanatory Statement points out terms and conditions that "are integral to a competing provider seeking to offer local telephone services over its own facilities"). This is precisely the service PCS providers generally offer. Nowhere is the Congressional requirement limited to LECs interconnecting with wireline competing providers.

[19] "Part 22 licensees are common carriers generally engaged in the provision of local exchange telecommunications in conjunction with local telephone companies . . . ." In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275 at ¶ 12 (1986).

[20] In the Matter of the Commission's Rules to Permit Service Offerings In the Commercial Mobile Services, Notice of Proposed Rulemaking, WT Docket No. 96-6 (January 25, 1996).

[21] The exception to this is one-way wireless services, such as paging. The issue is not whether these services are valued by consumers (they are) or whether they must be provided with "physical interconnection" pursuant to Sections 332 and 201 of the Act (they must), but whether they are entitled to assert LEC compensation obligations under Section 251 (see, e.g., PageNet, pp. 3-6). In fact, they do not fall within the scope of that statute because, as currently designed, they do not provide the "intercommunicating service" that is integral to local exchange service (Section 3(47)). This result is reinforced by those "narrowband" CMRS providers which argue that they do not provide "exchange service" (Arch, p. 16). Accordingly, this result is not contrary to the regulatory parity principles (cited by 360° Communications, pp. 6-7) for "similar services."

States jurisdiction under Section 252 which was earlier removed.[22] However, Section 332(c)(3) expressly preempted State regulation of the rates charged by CMRS and of CMRS "entry." While Section 332(c)(1)(B) speaks to the establishment of "physical interconnections" by common carriers generally, it refrains entirely from addressing particular interconnection requirements or compensation arrangements. Congress has now defined the parameters of LEC interconnection and compensation obligations to CMRS providers, as well as others, in Sections 251-252.[23] There is no inconsistency or "repeal" in these Congressional actions.[24]

Others argue that both Title II (Sections 251-252) and Title III (Section 332) of the Act apply, enabling the CMRS provider to choose between carrier negotiations with State approval (and arbitrations) under the former and Commission jurisdiction (and remedies) under the latter.[25] The Commission should reject such "forum-shopping" by stating herein that common carriers (including CLECs) are obliged "to establish physical connections with such [commercial mobile] service" under Section 332, subject to Commission oversight, and they are obliged to provide specific aspects of interconnection (including reciprocal compensation) under Section

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22 CTIA, pp. 2-6; see also Nextel, pp. 4-5, 11.

23 In doing so, it reaffirmed a process whereby federally-established requirements (especially LEC compensation arrangements) were to be implemented practically in negotiated agreements, again subject to State approval processes. See Petition on Behalf of Louisiana Pub. Serv. Comm'n., 10 FCC Rcd. 7898, 7908 (1995) (LEC-CMRS compensation arrangements specifically held to be the jurisdictional province of State regulatory authorities). AirTouch (p. 6) and others ignore this earlier decision of the Commission in arguing that the "rates" at issue here are exclusively the province of this Commission.

24 Indeed, NARUC properly points out that many parties actually seek to oust the State authorities of their regulatory powers, a result Congress has eschewed (NARUC, pp. 11-14).

25 See, e.g., Omnipoint, pp. 11-13.

251, pursuant to State approval and arbitration oversight. There is no need for the confusion engendered by commenters seeking to avoid this statutory scheme.[26]

Commenters fear that inclusion of LEC-CMRS compensation arrangements in this proceeding will delay, and perhaps derail, uniquely favorable resolution.[27] In part, this is an argument for expeditious regulatory process and, in part, this is a request for distinctively preferential treatment.[28] Neither of these arguments disprove the applicability of Sections 251-252. Properly viewed, they reveal instead the clear interrelationship of "LEC-CMRS" compensation issues to the entirety of LEC obligations in this proceeding, thus underscoring the need to avoid prejudging common statutory requirements elsewhere on a less complete record.[29]

Perhaps most importantly, there is no exigency requiring their premature resolution. It is NYNEX's understanding that many LECs and CMRS providers are moving forward rapidly to

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[26] Importantly, the Commission retains preemptive authority where State regulatory activities seek "to regulate the entry of or rates charged by any commercial mobile service or any private mobile service . . . ." under Section 332(c)(3), as recognized and preserved by new Section 253(e). These "preemption" appeals will necessarily be both State and fact specific. They do not form a basis for wholesale preemption here.

[27] See, e.g., CTIA, pp. 9-10.

[28] See, e.g., PCIA's request for the suspension of Sections 251-252 until "CMRS operators are full-fledged competitors to wireline local exchange carriers" before "it may be appropriate . . . to adopt a new regulatory structure that recognizes that full and equal competition and that governs all potentially competing services" (PCIA, p. 12) (emphasis supplied). Many others also argue for similar competitive handicapping for promotional reasons. See, e.g., Sprint, p. 87 (two year "start-up" period). There is no authority for the Commission to adopt such blatantly preferential and discriminatory policies.

[29] For example, CTIA states that CMRS providers send far more traffic for termination to the LECs, but arguably have higher costs (CTIA, pp. 7-9). Certainly these factors could lead to negotiated agreements under Section 251-252 which might differ from other agreements, but they do not change the applicability of those Sections to LEC-CMRS interconnection agreements. Moreover, if CTIA's argument were accepted, other carriers competitive with CMRS providers could not avail themselves of the State approval process (Section 252) to claim that such agreements were discriminatory. The Commission should not seek to establish a unique and preferential regime for LEC interconnection with one particular industry segment (wireless carriers).

put reciprocal agreements in place on the negotiated basis described in the statute.[30] For example, NYNEX has offered mutual and reciprocal compensation arrangements to all two-way CMRS providers throughout the NYNEX region. Some arrangements are already in place. Clearly, there is still additional ground to be covered, but progress is being made. Meanwhile, all of the "real world" data indicates that the cellular industry has grown at astronomical rates (approximately 50 per cent annually), while the prospects for PCS providers evidenced in recent auctions are even greater. There is no need for precipitous Commission action to prejudge important Section 251-252 statutory issues with respect only to CMRS providers.

B. Agreements With Non-Competing LECs Are NotGoverned By Section 251(c)(2)

Although the requests of CMRS providers for interconnection fall within the bounds of Section 251(c)(2), requests of non-competing adjacent LECs (hereafter "independent telcos") do not (NYNEX, pp. 25-28). Instead, those entities establish mutually supportive agreements with adjacent LECs which generally aid the smaller independent telcos by facilitating "infrastructure sharing" consistent with new Section 259.[31]

Some commenters nevertheless seek to draw these intercarrier agreements into the scope of Sections 251-252. Commenters cite to the language of 252(a)(1) as including "any interconnection agreement negotiated before the date of enactment of the Telecommunication Act of 1996" for support.[32] They fail to observe that this section is triggered by "a request for interconnection, services or network elements pursuant to Section 251" which does not include these independent

[30] Accordingly, PCIA is flatly wrong in asserting that "virtually, without exceptions" LECs do not pay CMRS providers (PCIA, p.14).

[31] See, e.g., Rural Tel. Association, pp. 11-19; AllTel, pp. 12-13. Time Warner argues that these entities may compete in the future (p. 86). If so, they may make Section 251 requests.

[32] See, e.g. Jones Intercable, pp. 22-24.

telcos. They also argue that, as a matter of policy, Section 252(i) demonstrates a Congressional directive to avoid discrimination by making available any interconnection, service or network element provided under "an agreement," but again they neglect to note the specific limitation "approved under this section" (Section 251(i))[33] which, as above, does not include non-competing, independent telco agreements.

In short, Congress has made a clear determination that LEC agreements with adjacent independent telcos are to be cooperative and supportive (Section 259). They should not be "chilled," disrupted and perhaps undone by LEC competitors.[34]

IV. COMPETING CARRIERS SHOULD NOT BE ALLOWED TO REQUEST UNBUNDLED ELEMENTS TO AVOID PAYING FOR A SERVICE THAT IS OFFERED FOR RESALE

The comments filed in this proceeding show that NYNEX has correctly construed the provisions of the Act regarding the relationship of the resale of services and the unbundling of network elements. The express terms of the Act, and the legislative history, compel the conclusion that the resale provisions take precedence over requirements for the unbundling of network elements. That is, resale provisions cannot be evaded through the combination of all of the network elements that compose a service offered for resale.

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33 AT&T best highlights this shortcoming by referring to Senate Bill § 251(g) the predecessor to final Section 252(i)-- for support (AT&T, p. 90 n. 138). What is remarkably different, however, between the Senate's § 251(g) provision and enacted Section 252(i) is that the latter has added the limiting language "approved under this section" to avoid bringing in other agreements not within the bounds of Section 251, as commenters seek herein.

34 Sprint argues clearly, but incorrectly, that it would be anticompetitive to allow an incumbent LEC to provide interconnection on one set of terms to a non-competing carrier, and on different terms to a competitor (p. 70). The distinction missed here is simple, but critical. The requirements for Section 251-252 agreements are designed to facilitate competitor's efforts, while LEC agreements with independent telcos are intended to support their service.

Teleport and MFS, among other commenters, agree with NYNEX on this point and make strong arguments supporting it. Teleport properly cites the legal tenet that "one section of a statute cannot be interpreted in a way that acts to nullify another section."[35] In addition, MFS correctly points out that "allowing carriers to purchase the functional equivalent of resold service by purchasing every network element required to provide service would eviscerate the joint marketing restriction in Sec. 271(e)(1)."[36] If the Commission were to sanction the use of unbundled elements as a substitute for resale, the carrier utilizing such elements would technically be considered a facilities-based carrier that is not subject to the joint marketing restriction.

The only authority in the Act that is cited in purported support of the erroneous construction that would permit the evasion of the resale provisions is the last sentence of §251(c)(3) which states: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide <u>such telecommunications service</u>" (emphasis added). In fact, however the words "such telecommunications service" refer to the service to be provided by the requesting telecommunications carrier, not a service offered by the incumbent LEC.

There is no evidence in the Act -- or the legislative history -- that Congress intended to provide competitors with an alternative way to "resell" the services of an incumbent LEC in addition to the specific resale provision in Section 251(c)(4). The attempts by commenters to create such an alternative are nothing but blatant attempts to manipulate the pricing provisions of §252(d) to create an opportunity for arbitrage. MCI's bald statements reveal its intent. To MCI,

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35 Teleport, p. 40.

36 MFS p. 40. Section 271(e)(1) applies to the joint marketing of "telephone exchange service obtained...pursuant to Section 251(c)(4) with interLATA services."

the "fundamental difference" between the purchase of a service offered for resale and the purchase of its piece parts as unbundled network elements is one of price.[37] Indeed, one commenter goes so far as to suggest that the possibility of arbitrage is a positive feature of the Act that is a "critically important procompetitive incentive."[38] As NYNEX has shown in its comments, however, the "top down" resale pricing methodology of retail price less avoided cost was hammered out by Congress as a way to protect local telephone service and universal service.[39] Arbitrage would entirely defeat this objective.

The model rules submitted by ALTS do not solve the arbitrage problem and, in fact, create more conflicts with the Act.[40] Essentially, ALTS proposes that the prices of services offered for resale and the prices of unbundled network elements be set so that (i) "[i]n no case shall the total price of any group of unbundled network elements that combined could comprise a total service exceed the lowest price for that resold service," and (ii) "[t]he resale price of any service . . . may not be less than the total price of the equivalent network elements."

These artificial price limits ignore the statutory pricing standards of §252(d). Such limits would also be unlawfully confiscatory if they prevented incumbent LECs from recovering their costs. In addition to these legal infirmities, a ceiling preventing an incumbent LEC from recovering its costs would not make economic sense. It would discourage incumbent LECs from investing in network improvements by increasing the risk that costs would not be recovered. In addition, by artificially setting prices too low, it would encourage competitors to under-invest in

37 MCI, p. 28.

38 Sprint, p. 28.

39 NYNEX, pp. 31-38.

40 ALTS, Attachment A, pp. 26, 29.

their own facilities, thereby impeding the development of facilities-based competition in the local market.

With regard to the much-abused last sentence of §251(c)(3), it should also be noted that it does not impose a statutory requirement on the incumbent LEC to combine the network elements it provides to a requesting telecommunications carrier (i.e., to connect the network elements to each other and/or to the facilities or equipment of the requesting telecommunications carriers). In fact, to the contrary, it is the requesting telecommunications carrier who must do the combining: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service" (emphasis supplied). Indeed, it is hard to imagine how a competitor could combine network elements unless it had its own facilities.

V. PRICING GUIDELINES FOR INTERCONNECTION MUST ENSURE THAT LOCAL EXCHANGE CARRIERS HAVE A REASONABLE OPPORTUNITY TO RECOVER THEIR COSTS

Several ICs view Sections 251 and 252 of the Act as an opportunity to drastically reduce the incumbent LECs' access charge revenues. They argue that the Act requires the Commission to adopt a total service long run incremental cost ("TSLRIC") standard for the pricing of unbundled network elements, interconnection, and collocation, defined in terms of a "blank slate" network (a network built from the ground up using the latest available technology).[41] In

[41] See, e.g., AT&T, pp. 46-73; MCI, pp. 61-68; LDDS, pp. 58-68. AT&T and MCI co-sponsor the "Hatfield Model," which applies TSLRIC pricing to a hypothetical network architecture for the local exchange network. See AT&T, p. 51 and Appendix E. Sprint also argues for a TSLRIC analysis, but it recognizes that a reasonable contribution to joint and common costs must be added to TSLRIC. See Sprint, pp. 43-49. As Sprint explains, "[i]f an ILEC is required to sell some products (i.e., products sold to other carriers) at TSLRIC, then the ILEC's retail prices must cover all shared costs. This places the ILEC at a competitive disadvantage." However, Sprint contradicts its own analysis when it argues that the

their view, network elements would include existing access services.[42] By requiring a "flash-cut" in access revenues, they would reduce their own access costs (but not, if experience is any guide, their own rates for long distance services) and they would leave the LECs without the financial ability to present a meaningful competitive challenge in the interexchange market.[43]

This would be completely contrary to both the letter and the spirit of the Act. Congress did not enact that law because it believed that a new, improved form of rate regulation was needed. The Act is deregulatory – it is designed to rely upon competition, not regulation, to reduce the price and to improve the quality of telecommunications services.[44] The Act does not authorize the Commission to adopt new pricing rules that would prevent the LECs from recovering their actual costs.[45] In fact, Section 252 guarantees the LECs that they will have an opportunity to recover their costs when they provide interconnection under Section 251.

The Act does not include any language that would require, or even permit, the Commission to ignore any of the LECs' actual costs in setting ceilings for interconnection rates.

Commission should impose an arbitrary limit on shared costs (no more than 15% of TSLRIC). See Sprint, p. 48.

42 See AT&T, p. 2; LDDS, pp 58, 68-76.

43 Sprint argues that the LECs should compensate for the revenue shortfall through "sound management and ingenuity." See Sprint, p. 58. Sprint does not explain exactly how it expects the LECs to accomplish this while continuing to provide the quality access services and local exchange services that ICs and end users expect to receive.

44 See S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) (purpose of the Telecommunications Act of 1996 is to provide a "competitive, deregulatory national policy framework" for telecommunications).

45 The ICs argue against any rules that would be "revenue neutral" for the LECs. See, e.g., Sprint, p. 59. While NYNEX recognizes that it will lose revenues due to competition, there is no reason why it should suffer a revenue reduction through the repricing of services that it will continue to provide to ICs and CLECs. If, as the ICs desire, the LECs will provide the equivalent of existing access services under Section 251, the LECs have the legal right to recover their existing costs.